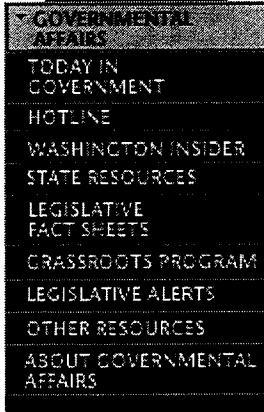
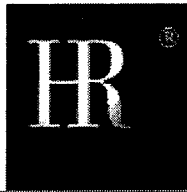
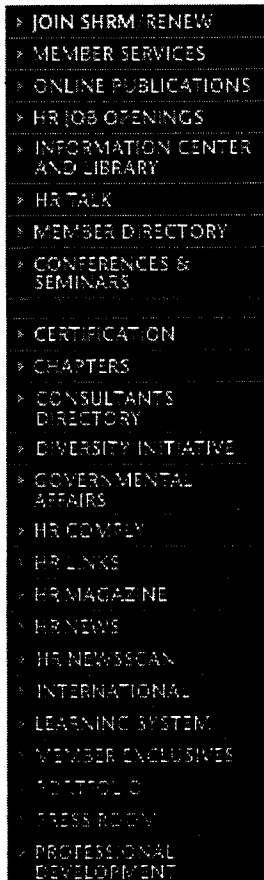


**Attachment 1****SHRM Letter to FTC on FCRA sexual harassment issue**

June 23, 1999

Chairman Robert Pitofsky  
Federal Trade Commission  
601 Pennsylvania Ave., N.W.  
Rm. 440  
Washington, DC 20580



Dear Mr. Pitofsky:

We are writing to express our grave concerns regarding the Federal Trade Commission's recent opinion letter which inappropriately extends the Fair Credit Reporting Act (FCRA) into the area of employee misconduct, specifically sexual harassment investigations. We would like to strongly urge the FTC to reconsider its interpretation of the statute.

SHRM is the leading voice of the human resource profession. SHRM provides education and information services, conferences and seminars government and media representation, online services and publications to more than 120,000 professional and student members throughout the world. The Society, the world's largest professional society dedicated to human resource management issues, is a founding member of the North American Human Resource Management Association (NAHRMA) and a founding member of the World Federation of Personnel Management Associations (WFPMA). SHRM currently serves as president of both of these organizations.

As you know, as amended the Fair Credit Reporting Act requires numerous notification and disclosure processes for employers who use third parties to check background information on applicants or current employees. Employers must also provide a summary of rights to an

- ▶ PROFESSIONAL EMPHASIS GROUPS
- ▶ SHRM BUYER'S GUIDE
- ▶ SHRM FOUNDATION
- ▶ SHRMSTORE
- ▶ STUDENT PROGRAM
- ▶ SURVEY PROGRAM
- ▶ VOLUNTEER OPPORTUNITIES
- ▶ WORKPLACE TRENDS PROGRAM

employee being investigated, disclosing the scope and nature of the investigation, obtaining that person's authorization before seeking a report, and providing a notice/waiting period before taking any adverse action against the employee being investigated.

Under the FTC's recent opinion letter, sexual harassment investigations are deemed to be considered investigative consumer reports and thus covered by the FCRA's notice and disclosure requirements. Under this interpretation, it appears that employers who hire outside entities, including attorneys, to conduct harassment investigations are required to share every aspect of these investigations with the alleged harassers, including the sources of all information obtained, before any adverse actions are taken. It also appears that employers are required to obtain prior written consent from any involved employees, provide notice and disclose the scope of the investigation to the employees and provide a copy of any report. The copy of the report would have to include the sources of all information obtained before any adverse action may be taken.

We urge the FTC to immediately rescind the opinion letter for the following reasons:

***The FTC Interpretations Interfere with Effective Investigations and Raise Potentially Dangerous Issues in the Workplace:*** The FTC's interpretation that the FCRA requires employers to fully disclose all information obtained during an investigation into allegations of sexual harassment -- or any other workplace incident -- is detrimental to the individuals involved and will bring unnecessary divisiveness into the workplace. Under the best of circumstances, witnesses are frequently reluctant to come forward or speak out in investigations. Knowing that they will almost certainly be identified to a fellow employee will discourage them from assisting in any kind of workplace investigation even if their testimony is vital to the interests of involved parties. And there are certainly instances where it is inappropriate and unwise to get "permission" in advance to conduct an investigation from someone who is suspected of a serious workplace crime or violent behavior!

The increasingly serious issue of workplace violence should not be ignored. According to the June 1996, SHRM Workplace Violence survey 54% of the reported incidents of workplace violence were employee against employee.

***The FTC Interpretation Directly Contradicts Current Law and Practice:*** This interpretation flies in the face of Congressional intent in enacting FCRA and directly contradicts current law and practice in employer's obligations to address sexual harassment/employee misconduct in the workplace. Current law dictates that sexual harassment investigations must be swift and effective. Indeed, the U.S. Supreme Court has recently provided additional impetus to employers to take immediate investigative and corrective action to avoid liability

under Title VII of the 1964 Civil Rights Act, with its decisions in *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth*. Not only will the time delays imposed by the FCRA impede effective sexual harassment investigations, they will allow what may be already volatile situations to continue or even escalate.

Furthermore, the EEOC has just recently provided additional enforcement guidance to its staff and the public on how such investigations should be conducted. In that guidance, the EEOC states that:

"d. Confidentiality

An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment should be shared only with those who need to know about it. Records relating to harassment complaints should be kept confidential on the same basis. A conflict between an employee's desire for confidentiality and the employer's duty to investigate may arise if an employee informs a supervisor about alleged harassment, but asks him or her to keep the matter confidential and take no action.

If an employer follows the EEOC guidance with respect to confidentiality, the employer would appear to be in violation of the requirements of the FCRA, as interpreted by the FTC!

***The Advanced "Permission" Requirement Poses Practical Problems:***

It may be impossible to get advanced permission if organizational diagnostics uncover problems that were not known in advance. For example, it is not uncommon for human resource departments to undergo an "audit" to determine if appropriate policies and procedures are in place to ensure compliance with the myriad of labor and employment laws. Frequently, an outside party performs this audit. As interpreted by the FTC, the FCRA would limit the ability of an employer to take prompt action as a result of problems uncovered in the course of such an audit. Would everyone in the department being audited be required to give advanced "permission" to conduct such an audit? How would the agency apply the FCRA requirements in the case where questions are raised in an accounting department, and an emergency audit, with outside auditors, is initiated? Would an employer be obligated to get "permission" for such an investigation from the very individuals who may be responsible for the irregularities?

***The FTC Interpretation Requires Inappropriate Disclosures, Which***

***May Violate Employee Confidentiality:*** The requirement to disclose investigative reports containing information on the results of employee interviews defies common sense and is contrary to current legislative efforts to *safeguard* employee privacy.

***The FTC's Interpretation Represents a Set Back in the Expanded Mediation Efforts Underway by the Equal Employment Opportunity Commission (EEOC):*** SHRM has worked closely with the Equal Employment Opportunity Commission to publicize the EEOC's expanded mediation program. SHRM has undertaken this effort in order to encourage the prompt and constructive resolution of employment related disputes, including allegations of sexual harassment. The FTC interpretation will discourage mediation and set back efforts to improve the EEOC's effectiveness in the resolution of such disputes.

***The FTC Interpretation May Jeopardize Attorney Work Product/Attorney-Client Confidentiality:*** Employee investigations and misconduct must be handled appropriately, with appropriate confidences for the protection of all parties. Under this FTC interpretation, harassment investigations may no longer have the possible protections of the attorney work product privilege or attorney-client confidentiality. Attorney-client privilege may be preempted where consumer investigative reports, advance written permission and full disclosure to an affected employee are required under the FCRA.

***The FTC Interpretation Raises the Possibility of Clearly Inappropriate Further Expansions:*** We are very concerned that this FTC interpretation could be expanded even further to include coverage of the myriad of investigations done by a paid third party (including a retained attorney). These investigations may arise as a result of complaints, allegations, and observations or be simply intended as organizational diagnostic activities. Under the interpretation of the FTC, any inappropriate conduct or other workplace activity that might indicate a need for adverse action against an employee could result in the entire process being categorized as an "investigation" resulting in a "consumer report and/or investigative consumer report," thereby subject to the FCRA's requirements. This could include due diligence evaluations preliminary to mergers/acquisitions, climate sensing assessments (opinion surveys, focal groups, individual interviews, etc.), coaching and counseling efforts with individual employees, and to wide-ranging organizational needs assessments such as organizational development interventions, cultural diversity diagnostics, etc. All of these measures are critical organizational activities, the effectiveness of which would be immeasurably harmed by considering their results "consumer reports" under the Fair Credit Reporting Act. Such an application is clearly inappropriate and well outside of the scope of Congressional intent under the Fair Credit Reporting Act.

In these times of tight labor markets, employers need to be able to make

quick employment decisions based on available information. Information contained in consumer reports and investigative consumer reports is often useful in making these decisions. The FCRA and the FTC's recent interpretation will prevent many employers from using the reports because of the unduly burdensome requirements and stiff penalties. This inappropriate extension of the FCRA into the area of employee misconduct will only further exacerbate the current problems.

Prior to this interpretation, the administrative problems under the current FCRA already discouraged both the use of neutral third parties and the use of background checks. This recent interpretation exacerbates these problems and creates difficulties for employers who do not have the internal expertise to conduct effective workplace investigations and for those who want to assure objectivity and neutrality by having an investigation done by a third party.

These are very serious issues. Certainly, the FCRA should be vigorously enforced to protect the rights of consumers-the original intent of the statute. However, we do not believe that the FCRA should be interpreted to extend into the realm of normal, internal business operations where there is a potential for uncovering employee misconduct. Such an interpretation drifts far from Congressional intent, conflicts with various employment laws, and impedes fairness in the employment process.

Sincerely,

Susan R. Meisinger, SPHR  
Senior Vice President

Cc: The Honorable Ida Castro  
The Honorable William Goodling  
The Honorable James Jeffords



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